

WHAT IS THE PRESENT LAW?

INDIAN STATUS

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Indian Status What is the Present Law?

The "rights" field is broad and complex rather than simple and lacks uniformity for Indians and non-Indians alike. This is explained by the fact that in our federal system rights may have their origin in federal and/or provincial legislation, through contracts and agreements, through custom and usage and in the common law of England or in the civil code in Quebec. Rights of federal origin generally apply to all Canadians including Indians. However, rights of provincial origin apply only to the residents of a province, vary to some extent from province to province and may or may not apply to Indian residents in the province dependent upon a number of circumstances. In addition, rights are in a constant process of change as existing legislation is amended or replaced by new legislation and as the rights under such legislation are interpreted by the Courts. In short, while there are basic rights which we all enjoy such as freedom of speech, thought and religion, to name a few, there may be a variation in the other rights enjoyed by individuals. Indians do not differ from other persons in this respect. In consequence, questions on rights can only be answered in general terms for the rights of an Indian living in one province may differ from the rights enjoyed by the Indians in a different part of Canada.

Another problem arises when the term "non-treaty Indian" is used. It has no precise legal meaning and is heard rarely except in western Canada where it is synonymous with the term "metis" and is used to describe persons who although of Indian ancestry are not in fact Indians as they do not meet the definition of Indian provided in the Indian Act, c. 149, R.S.C. 1952 as amended. They enjoy the same rights as other citizens of the province in which they reside. The fact of their Indian ancestry does not provide them with any special rights.

The term "non-treaty Indian" is occasionally used in distinguishing between the members of Indian bands which did or did not sign treaties with the Crown. It is a rare use, for in terms of meeting their needs, government programmes make no distinction between persons who are registered as Indians whether they are covered by treaties or not. However, in the "rights" field there are some significant distinctions between various groups of Indians arising out of the nature and content of their treaties.

Turning to the nature of Indian rights it can be said that in respect to rights of federal origin, Indians en-

joy virtually all the rights available to other Canadians. Their rights are not identical with non-Indians chiefly because they enjoy some special rights or privileges as well. These arise out of treaty arrangements made by the Indians with the Crown or as the result of special legislation such as the Indian Act which the Parliament of Canada, within its exclusive legislative jurisdiction over Indians, has enacted on their behalf. Questions concerning Indian rights are, therefore, best answered by identifying the rights that are exclusive or special to Indians.

What are these special rights or privileges? Among the more important are the right to be and remain an Indian and the rights that are exclusive to members of Indian bands. Only a small percentage of Canadians qualify, or can qualify, as Indians under the provisions of the Indian Act. Accordingly, being an Indian is a very special right as it evidences a direct link with the original inhabitants of Canada.

Important also is the fact that the law recognizes the right of an Indian to retain his special status and cultural heritage. Unless he voluntarily gives up his Indian status by the process of "enfranchisement" provided in the Indian Act he retains it whether he lives on or off an Indian reserve or in a foreign country. The same right is enjoyed by Indian women. The Indian Act provides that if an Indian woman marries a person who is non-Indian she forfeits her Indian status and the special privileges it provides. This provision has been held to be in conflict with the Bill of Rights by a Canadian court. The supreme court has been asked to decide this question.

Membership in an Indian band entitles an Indian to special rights not enjoyed by other Canadians. These include a joint interest with all the other members of a band in the land that has been set apart as a reserve for the band, the right to reside on the reserve; the right (in most cases) to receive a parcel of reserve land for his own use at not cost to him; the right to share equally with the other band members in any monies the band may realize from the lease or sale of part of the reserve or the disposal of resources such as timber, oil and gas; and the right to profit from the leasing of the parcel of land which the band has made available for his use.

Coupled with these rights pertaining to a reserve is the very important right to relief from the burden of taxation borne by other Canadians. Section 86 of the

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Indian Act relieves an Indian from the obligation of paying taxes in respect to any income he may earn from the utilization of his reserve land holding or from employment on his reserve. The same section also provides that no inheritance tax shall be payable upon the death of an Indian in respect to any of his property situated on a reserve provided his heirs are Indians.

Land forming part of a reserve whether held by the band or by individual Indians are also free from municipal taxation, although in most provinces a tax may be levied against a non-Indian who is leasing reserve land. This is not a tax on the land, merely a tax on the use made of it by a non-Indian and the tax is not payable by the band or the Indian landlord. The tax can only be collected from the non-Indian lessee.

One other important right, attaching to membership in a band, is the right in common with other members to decide what use shall be made of the reserve and its resources. Section 39 of the Indian Act gives each adult member of the band who is ordinarily resident on the reserve a vote in deciding on such matters as the sale or long-term lease of reserve lands or the disposal of valuable resources such as timber, minerals, oil and gas.

Many Indians have special hunting and fishing privileges not enjoyed by other Canadians. These rights vary widely across the country and in some instances there is doubt concerning the nature of the rights. The range of special hunting and fishing rights for Indians extends all the way from no special rights in some regions to the right of the Indians in the Prairie Provinces to hunt and fish for food on their reserves and on unoccupied Crown lands at any time.

There are also special rights arising out of the treaties or agreements negotiated with the Crown by various Indian bands. The basic government programmes for

Indians are extended to them on the basis of need rather than being dependent upon whether a band did or did not sign a treaty. However, because of their treaties some Indians have rights not enjoyed by other Indians. It is again difficult to be precise in respect to these special rights as the treaties and agreements are not uniform in their terms. To be specific about the special rights of the members of a particular band it would be necessary to know whether the band had signed a treaty and to examine the wording of that treaty. In general terms, few of the early treaties or agreements made provision for special rights of any kind. On the other hand, most of the treaties signed after Confederation provided for some special rights such as a small annual cash payment (usually five dollars) to each band member and an extra annual payment to the Chief and head men of the band; an annual supply of ammunition and fishing nets; agricultural equipment and in some cases special hunting and fishing rights. A number also contained a special provision in respect to the education of Indian children in schools on their reserves. Some of these special provisions have no special significance today — for example the provision in respect to education by reason of the fact that the government's education programme is the same for all Indians.

Apart from rights of treaty or federal origin, Indians also have rights of provincial origin for section 87 of the Indian Act provides that all provincial laws of general application shall apply to Indians unless they are in conflict with the terms of any treaty, the Indian Act or other federal legislation. The rights of provincial origin are generally the same rights that are enjoyed by other residents of a province. There are no special rights for Indians under provincial law as the provinces are constitutionally incapable of legislation specifically for Indians.

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